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Economic and Social Council

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**Committee on Economic, Social and Cultural Rights**

# Decision adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 21/2017*, **

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| *Communication submitted by:* | Joaquim Pinheiro Martins Coelho |
| *Alleged victim:* | The author |
| *State party:* | Portugal |
| *Date of communication:* | 22 June 2015 |
| *Date of adoption of decision:* | 6 June 2017 |
| *Subject matter:* | Equal opportunity to be promoted in an employment to an appropriate higher level |
| *Procedural issues:* | Committee's competence *ratione temporis*; manifestly ill-founded |
| *Substantive issue:* | Right to the enjoyment of just and satisfactory conditions of work |
| *Article of the Covenant:* | 7 (c) |
| *Article of the Optional Protocol:* | 3 (2) (b) and (c) |

1.1 The author of the communication is Joaquim Pinheiro Martins Coelho, a Portuguese national of legal age. He claims that the State party violated his rights under article 7 (c) of the International Covenant on Economic, Social and Cultural Rights.[1] The author is a lawyer.

1.2 On 20 February 2017, the Working Group on Communications, acting on behalf of the Committee, decided that observations from the State party were not needed to ascertain the admissibility of the present communication. Accordingly, the present communication was not transmitted to the State party, in accordance with article 6 (1) of the Optional Protocol.

* Adopted by the Committee at its sixty-first session (29 May–23 June 2017).

** In accordance with rule 5 (1) (c) of the provisional rules of procedure under the Optional Protocol, Committee member Maria Virginia Bras Gomes did not take part in the consideration of the communication.

[1] The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights entered into force for Portugal on 5 May 2013.

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## A. Summary of the information and arguments submitted by the author

**Facts as submitted by the author**

2.1 The author worked as a superior technical career adviser at the Institute of Social Security, a governmental institution, for several years. He claims that from 2003 he was interested in seeking a promotion.

2.2 According to article 4 (1) of Decree-Law No. 404-A/98/18/12, promotion was conditional upon a "key performance" rating of "very good" for three consecutive years. However, that provision was amended by article 15.4 of Law No. 10/2004/22/03, reducing the requirement of three consecutive years to two years (provided that the other promotion requirements were met). The author submits that he received a performance rating of "very good" in 2003. He also submits that he should have obtained the same rating in 2004. However, the Chair of the Governing Board of the Institute of Social Security did not approve his 2004 performance assessment, despite the three requests that he submitted in 2005. The author claims that this was the Chair's "act of revenge" and that as a result of not receiving the 2004 performance assessment in a timely manner, he was prevented from applying for promotion to the position of senior adviser in 2005 and 2006.

2.3 The author claims that since he was informed that he would be subject to mandatory retirement from 17 January 2007, he voluntarily submitted a retirement request on 29 December 2005. His 2005 performance assessment should have been provided to the author by 15 March 2006. However, he only received it in June 2006. The author claims that he then became aware of a new legal provision[2] by which the 2004 performance assessment of those who had not received it, owing to administrative problems, was to be considered equal to the one accredited for 2005.

2.4 After his voluntary retirement process was suspended at the author's request, he took part in three applications for promotion. Two of them were not concluded and the results of the third one were only published on 1 March 2007 after the author had entered mandatory retirement.

2.5 On 11 December 2007, the author lodged a request for civil liability before the Lisbon Administrative Court (Tribunal Administrativo de Círculo de Lisboa) against the Chair of the Governing Board of the Institute of Social Security for a "special ordinary administrative action based on extra contractual civil liability on the grounds of unlawful acts", requesting, inter alia, a lifetime monthly compensation of 1,256 euros, with retroactive effect from 15 March 2005.

2.6 On 15 May 2008, the court dismissed the author's request. The decision stated that the author's claim of civil liability was based on the failure to provide him with a performance assessment and that this failure prevented him from applying for a higher category placement in the Institute of Social Security. However, the court considered that there were legal means to overcome that omission. Furthermore, the author did not meet the legal requirement of receiving good performance reports for three consecutive years in order to apply for a promotion and he was unable to prove that he had applied to a post unsuccessfully, owing to the lack of a performance assessment. The court thus concluded that neither the allegedly unlawful conduct attributable to the Chair of the Governing Board of the Institute nor the alleged damage had been established.

2.7 On 6 October 2008, the author appealed against the decision before the Central Administrative Southern Court (Tributário Central Administrativo Sul). On 11 January 2013, the court dismissed the author's application. The decision stated that the author had not received the 2004 performance assessment in a timely manner; that this had prevented him from applying for a promotion in 2005, provided that he received a "very good" final assessment grade; and that it constituted an unlawful and wilful act by the administration. However, the court stated that the author had requested voluntary retirement on 19 December 2005, which prevented him from applying to a higher category, even though he was in possession of all the necessary performance assessments, including the 2004

[2] Contained in article 1 of Law No. 15 of 26 April 2006.

performance assessment. Moreover, the author had failed to prove that the Chair of the Governing Board of the Institute of Social Security had exceeded the limits of his duties or acted intentionally. Therefore, according to the court, there was no causal link between the wilful or unlawful act and the damage that the author had allegedly suffered.

2.8 On 24 January 2013, the author requested the court to review its judgment. The author claimed that he had submitted evidence of the suspension of his retirement process in June 2006 and that at the time he had asked for voluntary retirement, he still had not received the 2005 performance assessment. He added that because of the delay in obtaining that assessment, he was only able to seek promotion starting from June 2006. The author further claimed that the Chair of the Governing Board of the Institute of Social Security had delayed his evaluation in bad faith, since he knew that the author would soon turn 70 and the promotion selection process usually lasted 10 months. On 12 April 2013, the court dismissed the author's application.

2.9 On 27 September 2013, the author lodged an application for special review before the Supreme Administrative Court (Supremo Tribunal Administrativo). On 18 February 2014, the court considered the author's application to be inadmissible, stating that an application for special review was of an extraordinary nature and that the author's application did not disclose matters of fundamental or social relevance, or a clear need for a review of the application of the law.

2.10 On 10 April 2014, the author submitted an application to the Constitutional Court and alleged, inter alia, that the decision of the Supreme Administrative Court violated his constitutional rights, owing to the fact that it had interpreted article 150 of the Administrative Procedural Code in a way that restricted access to a fair trial, preventing individuals from defending their rights, and that as a result his rights under article 7 (c) of the Covenant had been violated. On 27 June 2014, the Constitutional Court found that the author's application did not meet the admissibility requirements since it did not raise a question of constitutionality. The author claims to have exhausted all available domestic remedies.

2.11 The author submits that although the facts of his case occurred before 5 May 2013, the date when the Optional Protocol entered into force for Portugal, the violations of his rights are ongoing and that the decisions of the Supreme Administrative Court and Constitutional Court occurred after that date.

**Complaint**

3.1 The author claims that the State party violated his rights under article 7 (c) of the Covenant. By failing to provide him with his 2004 performance assessment with a positive evaluation in a timely manner, the authorities of the Institute of Social Security prevented him from applying for a promotion. Despite acknowledging the failure by the Institute, the State party's courts arbitrarily dismissed his applications and did not remedy the violation of his rights under the Covenant.

3.2 The author requests as reparation to be compensated by the State party for the material damage that he suffered, as well as the losses arising out of the legal proceedings, in the sum of 377,244 euros and added interest at a rate of 12 per cent. The State party should pay the author's pension for his lifetime, in the sum of 1,236 euros per month, effective from 15 March 2005, plus default interest at a rate of 12 per cent.

## B. Committee's consideration of admissibility

4.1 Before considering any claim contained in a communication, the Committee on Economic, Social and Cultural Rights must decide, in accordance with rule 9 of its provisional rules of procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, whether the communication is admissible or not under the Optional Protocol.

4.2 Under article 3, paragraph 2 (b), of the Optional Protocol, the Committee shall declare a communication inadmissible when the facts that are the subject of the

communication occurred prior to the entry into force of the Optional Protocol for the State party concerned, unless those facts continued after that date. In the present case, the Committee notes that the relevant facts that gave rise to the violations alleged by the author took place before 5 May 2013, the date of entry into force of the Protocol for the State party. However, the decisions of the Supreme Administrative Court and the Constitutional Court denying the author's applications were taken on 18 February 2014 and 27 June 2014, respectively. Those applications provided an opportunity for the Supreme Administrative Court and the Constitutional Court to consider the substance of the violations under the Covenant alleged by the author.[3] The Committee therefore considers that it is competent *ratione temporis* to consider the present communication.

4.3 The Committee takes note of the author's allegations that by failing to provide him with the 2004 performance assessment with a positive evaluation in a timely manner, the authorities of the Institute of Social Security prevented him from applying for a promotion in violation of his rights under article 7 (c) of the Covenant. The Committee has thoroughly examined the author's allegations and the information raised in his communication, including the documentation attached to it in support of his claims, and observes that the author's allegations rely on the fact that the failure of the Institute to provide him with the 2004 performance assessment would in itself constitute a violation of the Covenant. However, the Committee notes that the author has not identified a specific post or a selection process in which he could not participate, or from which he was disqualified due to the lack of the 2004 performance assessment, either in his communication before the Committee or in his applications before national authorities. Furthermore, after suspending his voluntary retirement process, the author took part in three applications for promotion, which were not concluded when he entered mandatory retirement. Accordingly, the Committee considers that the communication is inadmissible as the factual allegations made are insufficiently substantiated. At the very least, the facts adduced in the communication should allow the Committee to assess whether or not they reveal a violation of the Covenant.

## C. Conclusion

5. The Committee therefore decides:

(a) That the communication is inadmissible under article 3 (2) (e), of the Optional Protocol;

(b) That this decision should be transmitted to the author and, for information, to the State party.

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[3] See communication No. 2/2014, *I.D.G. v. Spain*, Views adopted on 17 June 2015, para. 9.3.